

MEDICAL JURISPRUDENCE†

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San Francisco

Vasectomy and Salpingectomy Under California Law*

In recent years there has been considerable discussion pro and con, with respect to sterilization of humans. Sterilization involves social, economic, and legal problems with all of which physicians are vitally concerned. In this article we shall limit ourselves to a discussion of the legal aspects of sterilization, particularly emphasizing the duty and privileges of physicians.

It must be understood that we are not approaching the problem of human sterilization from a social point of view; that is to say, we are neither advocating sterilization nor opposing it; we are neither endeavoring to point out how it can be done with legal safety, nor are we endeavoring to discourage sterilization operations by erecting or magnifying legal obstacles. On the contrary, we shall merely endeavor to analyze those rules of law which, in our opinion, are applicable and that govern physicians who undertake to determine whether or not a particular person should be sterilized.

Any discussion of the legal status of sterilization must be divided into: first, compulsory sterilization by state agencies; and, second, voluntary sterilization by private physicians. In turn, the second division should be subdivided into: first, the criminal law as applied to sterilization; and, second, the civil liability, if any, arising out of sterilization.

I. Compulsory Sterilization by the State

Status of Compulsory Sterilization.—California has become the leading state in development and application of the policy of sterilizing unfit persons. Of some eight or nine thousand compulsory sterilizations performed in this country up to 1938, approximately six thousand occurred in this state. These numbers have without doubt increased several thousand since 1938.

The California statutes under which these sterilizations have been performed are:

Section 6624 of the Welfare and Institutions Code, which provides:

The provisions of this section apply to any person who has been lawfully committed to any state hospital, and who is afflicted with, or suffers from, any of the following conditions:

- (a) Mental disease which may have been inherited and is likely to be transmitted to descendants.
- (b) Feeble-mindedness, in any of its various grades.
- (c) Perversion or marked departures from normal mentality.

(d) Disease of a syphilitic nature.

Before any such person is released or discharged from a state hospital, the State Department of Institutions may, in its discretion, cause such person to be sterilized. Such sterilization, whether performed with or without the consent of the patient, shall be lawful and shall not render the department, its officers or employees, or any person participating in the operation liable either civilly or criminally.

and Penal Code, Section 645, which states that:

Whenever any person shall be adjudged guilty of carnal abuse of a female person under the age of ten years, the Court may, in addition to such other punishment or confinement as may be imposed, direct an operation to be performed upon such person for the prevention of procreation.

and Deering's General Laws, Act 539, which provides that

whenever the resident physician of the state prison deems it to be beneficial to the physical, mental, or moral condition of any recidivist lawfully confined in such prison to be asexualized, such physician shall consult with the general superintendent of state hospitals, and the secretary of the State Board of Health, and after a joint examination into the particulars of the case the three may direct the operation to be performed. However, such operation cannot be performed unless the recidivist has been committed to a state prison at least twice for rape, seduction, etc., and has given evidence that he is a moral and sexual degenerate. The Act also provides that any minor idiot may be asexualized under the direction of the medical superintendent of any state hospital with the written consent of the parents or guardian.

Nineteen states have some statutory regulation of sterilization. The objective of eleven of these is both eugenic and therapeutic, of six purely eugenic, and of two eugenic, therapeutic and penal. Seven statutes provide both for voluntary and compulsory sterilization, seven for compulsory sterilization only, and five for voluntary sterilization only. Three-fourths of the operations throughout the country have been on the insane, one-fourth on the feeble-minded; and of the total, more than one-half have been on males.

With respect to those persons who are within the foregoing statutes (*i. e.*, feeble-minded, perverted or syphilitic persons, recidivists, rapists, and persons with inherited mental diseases), sterilization by a state agency is lawful.

II. Sterilization Outside of State Institutions

Therapeutic Sterilization.—In California there is no statute expressly granting or denying the right to perform or have performed a sterilization operation outside of state institutions. However, it would seem reasonable to conclude that, at least in so far as therapeutic sterilization is concerned, it can be performed legally under some conditions even in the absence of express permission of law. The scope of those conditions can only be ascertained or surmised by drawing analogies to similar laws. It is quite likely that the rules relating to abortions would govern since the avowed purpose to be accomplished is similar even though there is no "taking of a life" in sterilization operations. In relation to abortion, the Penal Code of California, Section 274, provides:

Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug or substance, or uses or employs any instrument or other means whatever with intent thereby to procure the miscarriage of such woman, *unless the same is necessary to preserve her life*, is punishable by imprisonment in the state prison not less than two nor more than five years.

In abortion cases it is necessary that the physician determine for himself that the patient's life will be endangered by pregnancy. There are no guide-posts to assist the physician in this determination and, therefore, as a protection to himself, consultation and approval of one or more other physicians should be obtained. Whenever this care has been taken, the physician may feel fairly certain as to his immunity. There is no case on record in which a physician has been held responsible criminally or civilly under such circumstances. As to the exact illness or condition that must be present, no suggestion can be offered, except that any physical condition which would endanger the mother's chances of surviving childbirth is undoubtedly sufficient ground for the operation. In the light of this, it can be said that sterilization of the female may properly be performed under like circumstances.

As to the male, the situation is more difficult. In *Christensen vs. Thornby*, 255 N. W. 620, Minn. 1934, the facts were as follows: A vasectomy had been performed upon a male because his wife's life would have been endangered by pregnancy. Thereafter, the physician was sued for damages on the ground that he had advised the plaintiff

† Editor's Note.—This department of CALIFORNIA AND WESTERN MEDICINE, presenting copy submitted by Hartley F. Peart, Esq., will contain excerpts from the syllabi of recent decisions, and analyses of legal points and procedures of interest to the profession.

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that the vasectomy had been successful and guaranteed sterility. Some time following the operation, however, the plaintiff's wife became pregnant and plaintiff, because of his wife's condition of health which would render childbirth dangerous, experienced anxiety and was subjected to considerable expense before and after the birth of the child. The Court, in rendering a decision in favor of the defendant physician, stated that there was nothing immoral about such an operation since most states permit the same upon the female to protect her life, and that there is no reason why the husband should not be permitted to submit to a vasectomy to protect his wife since there is much less danger involved in that operation than in a salpingectomy. The Court stated that the argument that the husband might later marry some other woman and be incapable of progeny is not sufficient to render the operation immoral. The Court stated:

Therefore, in our opinion, it was entirely justifiable for them to take the simpler and less dangerous alternative and have the husband sterilized. Such an operation does not impair, but frequently improves, the health and vigor of the patient. Except for his inability to have children, he is in every respect as capable physically and mentally as before. It does not render the patient impotent or unable "to fight for the king" as was the case in *mayhem* or maiming. *Liability of Physicians for Sterilization Operations*, Am. Bar Assn. Jour., Vol. 16 (1930), p. 158. See *Smith vs. Wayne Probate Judge*, 231 Mich. 409, 417, 204 N. W. 140, 142, 143. We, therefore, hold that under the circumstances of this case the contract to perform sterilization was not void as against public policy, nor was the performance of the operation illegal on that account.

(To be concluded.)

LETTERS†

Concerning Malpractice Liability Through Volunteer Nurses' Aides:

EMERGENCY MEDICAL SERVICE
411 Phelan Building, 760 Market Street
San Francisco 2, California

November 29, 1944.

Mr. Wm. Yount, Deputy Director,
Southern Area, California State War Council,
Room 627, State Building,
Los Angeles, California.

Dear Mr. Yount:

Enclosed is a copy of an opinion voluntarily rendered to me by Hartley F. Peart, Esquire, General Counsel, California Medical Association, on the liability of Volunteer Nurses' Aides to suits for malpractice.

Dr. Halverson has signed a letter requesting an opinion on the same question of the State Attorney General.

When information from the Attorney General has been received here, I shall forward a copy of it to you.

Sincerely,

(Signed) MORTON R. GIBBONS, M.D.,
Chief, Emergency Medical Service.

San Francisco 4, November 25, 1944.

California State War Council,
Emergency Medical Service, addressed.

Attention: Morton R. Gibbons, M.D., Chief, Emergency Medical Service.

Dear Doctor:

I have examined your letter of November 24, with en-

closed copy of Dr. Halverson's request to the Attorney General for an opinion.

I believe that volunteer nurses' aides could be subjected to liability in a malpractice action, even though their services are purely voluntary and gratuitous. In so far as the voluntary aspect of their services is concerned, they would be in the same position as a physician donating his services to county hospitals or charitable institutions. Such a physician is subject to malpractice actions to the same extent as a private physician offering his services for a fee.

The fact that a nurses' aide does not have the same training and experience that a registered nurse has would undoubtedly lower the standard of care which she would be required to fulfill. In my opinion, however, it would be possible to hold a nurses' aide liable for damages resulting from a departure by her from the standard of care normally exercised by other nurses' aides or persons having similar training and qualifications in the community. Of course, a nurses' aide would not be held to the same standard of care as a registered nurse, and if she acted under direct instructions from a registered nurse or a licensed physician, I do not believe that any court would hold her responsible for the results of her actions.

I know of no provision in the War Powers Act or the War Civilian Security Program to meet this danger.

Yours very truly,

(Signed) HARTLEY F. PEART.

Concerning Literature to Military Camps:

STATION HOSPITAL
OFFICE OF THE SURGEON
MUROC ARMY AIR FIELD
Muroc, California

My dear Doctor:

Your recent letter offering to send medical literature to this station has been read with unusual interest and has been posted on the bulletin board for the information of all Medical Officers on duty here.

Your periodicals will be a valuable addition to the professional library of this hospital.

Please convey our grateful appreciation to the members of your Association.

Most sincerely,

(Signed) ROGER S. THOMPSON,
Lt. Colonel, MC,
Surgeon.

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ARMY SERVICE FORCES
NINTH SERVICE COMMAND
Headquarters Camp Beale, California

Dear Dr. Kress:

This letter will acknowledge the receipt of the medical journals and books which were sent to this hospital recently by the C.M.A. Postgraduate Committee.

We appreciate your effort in sending this material to us and feel sure that the medical officers in the different Commands will profit by the receipt of this literature.

We have a fairly complete library at this hospital so far as current medical journals are concerned. However, we are short of medical books, particularly on diseases of women. Now that we have the WACs with us, we find that our problems along this line are increasing and reference books dealing with gynecological problems would be very acceptable.

Thanking you for your interest, I am,

Fraternally yours,

(Signed) OLIN PAUL,
Major, MC,
Chief of Medical Branch.

† CALIFORNIA AND WESTERN MEDICINE does not hold itself responsible for views expressed in articles or letters when signed by the author.